Before the
FEDERAL COMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Implementation of Section 621(a)(1) of the)
Cable Communications Policy Act of 1984) MB Docket No. 05-311
as amended by the Cable Television Consumer)
Protection and Competition Act of 1992)

REPLY COMMENTS
OF
MT. HOOD CABLE REGULATORY COMMISSION (MHCRC)
representing Multnomah County and the
Cities of Gresham, Fairview, Portland, Troutdale and Wood Village, Oregon

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INTRODUCTION

These Reply Comments are filed by the Mt. Hood Cable Regulatory Commission ("MHCRC"), representing Multnomah County and the cities of Gresham, Fairview, Portland Troutdale, and Wood Village, Oregon ("MHCRC Jurisdictions")[1]. The MHCRC joins and adopts by reference Comments filed in this proceeding by the National Association of Telecommunications Officers and Advisors ("NATOA"), the National League of Cities, the National Association of Counties, the U. S. Conference of Mayors, the Alliance for Community Media and the Alliance for Communications Democracy dated February 13, 2006.

The MHCRC's initial comments demonstrated that the MHCRC and its Jurisdictions have never presented any obstacles to video market entry by competitive cable and telecommunications providers in MHCRC territory. In fact, as documented in our initial comments, the opposite is true. The MHCRC and its Jurisdictions have made every effort to support and encourage competition in MHCRC franchise areas.

Cable franchise areas under MHCRC jurisdiction are presently served by two Incumbent Local Exchange Carriers ("ILECs"): Qwest and Verizon. Both ILECs have expressed interest in rebuilding their existing telephone systems here to provide competitive video services, in addition to high-speed data and voice services.

[1] The MHCRC on February 9, 2006 filed initial comments in this proceeding, ("MHCRC Initial Comments") which are adopted and incorporated herein by reference. The MHCRC's initial comments are available on the FCC's Electronic Comment Filing System (ECFS) as follows: http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518324653 (visited March 22, 2006).

The MHCRC welcomes these plans and the renewed prospect for competition, new services, and new choices for households and businesses in MHCRC territory.

However, the MHCRC is dismayed by the initial comments filed by Qwest and Verizon in this proceeding. The comments of both ILECs contain a number of assertions and interpretations based on misleading or unsupported assumptions having no factual relationship to the history and practice of cable franchising and regulation here. Moreover, in a number of respects, many of the positions and views urged by Qwest and Verizon, if adopted by the Commission in whole or in part, could damage the existing array of local public benefits in place in MHCRC franchise areas. These longstanding benefits, relied on by schools, local governments and citizens throughout our communities, are the collective product of community ascertainment addressed to local needs, were negotiated at arms-length with the cable operator, and are critical components of our current, cable franchise agreements.

Although the MHCRC is not, with the time and resources available, able to address exhaustively each and every objectionable point in Qwest's and Verizon's initial Comments, we would like to take this opportunity to address several areas of particular importance.

I. Response to Qwest comments on Build-Out Requirements

As documented in the MHCRC's initial comments, current MHCRC-administered cable franchises, as well as predecessor cable franchises issued by the

MHCRC Jurisdictions, required a build-out of the franchise areas on a schedule mutually agreed between the Jurisdiction and the franchisee. Such a build-out was intended to ensure, among other things, that cable service was available to all homes and businesses in the franchise areas under non-discriminatory rates and reasonable terms and conditions.

The franchise build-out requirements negotiated by the MHCRC and its Jurisdictions are well-founded, based not only on the common-sense public interest in making sure all citizens have access to the services to be provided, but supported also by the language and legislative history of applicable federal law. The MHCRC agrees with the Commission's own tentative conclusion supporting such requirements.[2] As the Commission itself pointed out, build-out requirements, anti-redlining requirements, and public, educational and governmental access ("PEG") requirements are all reasonable requirements to place on cable operators, including new entrants. Indeed, such requirements are statutorily authorized.

However, in comments filed by Qwest[3], the Commission is urged to adopt a binding interpretation of Section 621(a) of the Cable Act to the effect that *any* build-out requirement contained in a competitive franchise granted to a second wireline entrant constitutes *per se* an "unreasonable refusal to award a competitive

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[2] Paragraph 21, Notice Of Proposed Rulemaking, In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311 (released November 18, 2005) ("NPRM")

[3] Initial Comments of Qwest Communications International, Inc, dated February 13, 2006, as filed in this NPRM. http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518328412 (visited March 22, 2006).

franchise."[4] In putting forth this startling argument, Qwest argues against the Commission's tentative conclusion as well as the language and history of the federal Cable Act itself. Prohibitions against discrimination and assurances that all residents will be served are required of local franchising authorities (LFAs) by both the express language of the Act,[5] as well as its legislative history[6]. Moreover, both the Act and LFAs (including the MHCRC) recognize that a reasonable period of time must be allowed for serving households in the franchise area.[7]

Ensuring that service was eventually extended to all households under a negotiated and economically-reasonable build-out timeline is precisely what the MHCRC and its Jurisdictions did previously in working with competitive franchise applicants, and will continue to do.[8] There is simply no marketplace evidence that build-out and anti-redlining requirements create any barriers to entry for Qwest or any other ILEC. A blanket prohibition against build-out requirements, as urged by Qwest, would serve only to do exactly what the statute and LFAs have long sought to prevent: promote discrimination and economic redlining, and foreclose LFAs

[4] Qwest comments, Section VII.
[5] "In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides." Cable Communications Policy Act of 1984, amending the Communications Act to include Section 621(a)(3), codified at 47 U.S.C. §541(a)(3).
[6] "Under this provision, a franchising authority in the franchise process shall require the wiring of all areas of the franchise area to avoid this type of practice." H. Rep. No. 09-934 at 59 (1984).
[7] Statutory language was added in 1992 that required franchises to "allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area." Cable Television Consumer Protection and Competition Act of 1992, amending the Communications Act to include Section 621(a)(4)(A), codified at 47 U.S.C. § 541(a)(4)(A).
[8] MHCRC Initial Comments, *op. cit.* at fn 1, Section XVI. Build-out requirements were negotiated with competitive franchise applicants based on their financial models, financing assumptions, and penetration projections, and were never arbitrarily imposed by MHCRC Jurisdictions.

from acting in the public interest by ensuring that the benefits of competition are available to every household and business in MHCRC franchise areas.

Moreover, Qwest's blanket request is based on a fundamental mischaracterization of the locally-negotiated context of build-out requirements. As pointed out in the initial comments filed by NATOA and others in this proceeding,[9] build-out requirements are negotiable and can vary even in adjacent franchise areas based, e.g. on geography and density. As documented in the MHCRC's Initial Comments, the required build-out provisions in MHCRC franchise areas have always been subject to density limitations that represent a compromise between the need to serve households as widely as possible, and the economic realities facing the cable operator.[10]

Therefore, Qwest's melodramatic "line-in-the sand" statement that "*it is not rational for Qwest to enter into any franchise agreement that mandates an unconditional build-out of Qwest facilities to the entire area governed by an LFA, and Qwest will not do so*[11]." is facially unreasonable. There is no evidence of any LFA that has demanded an "unconditional build-out" among the thousands of existing cable franchise agreements issued nationally. To the contrary, most local franchise agreements contain negotiated and well-understood build-out constraints, such as density limitations, cost-sharing requirements, and lengthy construction periods of the type routinely agreed to by MHCRC Jurisdictions in consideration of

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[9] *Op. cit.* fn 2.

[10] MHCRC Initial Comments, Section VII, sets forth the density limitations and line extension costs that must be met by subscribers requesting service in areas that are economically infeasible for the cable operator to serve entirely at the operator's own expense.

[11] Qwest initial comments, *op. cit.,* Section III at page 10.

the economic realities to be faced by a new market entrant, conditions which can be much more formidable than those that faced the initial franchisee. The different economic reality faced by any wireline competitor self-evidently justifies tailoring build-out requirements differently from those imposed on the initial entrant. That is exactly why the MHCRC Jurisdictions exercised flexibility on this point when approached by potential competitors over the last several years, by, e.g. substantially lengthening the period of time (measured in years) by which most households in the franchise area should have service available from a competitor. Agreement on such constraints between the LFA and the new market entrant is both a common and a common-sense practice, balancing the need of the wireline-competitor to construct its system on an economically viable basis with the need of the franchising authority to ensure that all households and businesses, regardless of their location or economic status, can look forward eventually to enjoying the benefits of competition.

Although it is not often that the MHCRC can cite cable industry comments with approval, in this instance the initial comments filed by Comcast aptly describe our concerns regarding ILEC market entry in the absence of any build-out requirement (as urged by Qwest). "While there is no marketplace evidence that build-out requirements are creating barriers to ILEC entry, there is substantial evidence that many neighborhoods will likely be denied the benefits of additional competition. Policymakers at all levels of government should be concerned by statements and practices by the ILECs that reflect a clear intent to limit deployment and to target their limited investment to wealthier communities."[12]

2. Response to Verizon comments on video franchising

In contrast to Qwest's initial comments, which primarily focus on local build-out requirements and a few other issues, Verizon's initial comments in this proceeding[13] facially attack or seek to drastically diminish or limit virtually every aspect of longstanding LFA franchising policy and practices. These processes are otherwise well-understood and settled, over the course of the past two decades, pursuant to federal statutory guidelines overseen by the Commission, Congress, and the Courts.

If Verizon's sweeping objections to longstanding LFA franchising provisions and practices, and radical deconstruction of applicable statutory provisions were to be wholly or partially accepted by the Commission in this proceeding, then there would be very little left of the public benefits, PEG facilities, non-discriminatory build-out, Institutional Network, and other substantive franchise provisions presently included in the cable franchises administered by the MHCRC. These threatened provisions, and the associated public benefits provided, have already

[12] Initial Comments of Comcast Corporation, dated February 13, 2006, as filed in this NPRM, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518328205 (visited March 22, 2006).

[13] Initial Comments of Verizon, dated February 13, 2006, as filed in this NPRM, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518328270 (visited March 22, 2006).

been comprehensively set forth in the MHCRC's initial comments in this proceeding.

To shed some degree of light on the breadth and scope of Verizon's intemperate frontal assault on otherwise-settled franchise-related legal doctrines and practices, the MHCRC would offer the following comments, listing relevant MHCRC franchise provisions where applicable. Among these provisions are longstanding commitments negotiated at arms length with the cable operator after extensive community ascertainment, which collectively provide the foundation for many critical public benefits presently provided in MHCRC territory. All of such commitments and benefits could be adversely affected by virtually any degree of Commission action giving credence to the extreme positions that Verizon has urged in its comments.

1. **Under the guise of promoting competition, Verizon broadly and fundamentally attacks the structure of the local cable franchising system and the negotiated public benefits it provides.** Let there be no doubt on this score: Verizon's comments repeatedly, fundamentally, and facially attack the local cable franchising process in its entirety, e.g. "the very nature of the franchise system leads to anticompetitive effects that make it difficult for a competitor to enter and compete efficient (sic) in the video market."[14] Reduced to its essence, Verizon's overall argument appears to be that the carefully structured dualism of the federal-local cable franchising process, including virtually all of the associated benefits and limitations, as set forth in detail in the 1984 and 1992 Cable Acts, is invalid *per se*

[14] Verizon Comments, Background, page 5.

due to the competitive command of Section 621(a)(1) of the Cable Act, the subject of this proceeding. If the Commission is unwilling to go as far as Verizon urges in scuttling cable franchising *per se* based on Verizon's radical view of Section 621(a)(1), then Verizon's backup argument, reiterated consistently in Verizon's comments, is that the franchising process and associated franchise benefits are invalid on Constitutional grounds, based on Verizon's self-interested reading of the First Amendment.

Verizon's broad assertion that longstanding cable franchising practices are invalid either under Section 621, or else contrary to the First Amendment, is exemplified in the following Verizon comment, which is typical of many. "The current local franchising process generates unwarranted delays and is engrained with overreaching practices---most of which are unlawful under the Cable Act and the First Amendment"[15]

If the Commission were to adopt Verizon's views in any substantial part, then the structure of local franchises to manage the use of public rights-of-way, and the requirement for providing compensation and associated public services under applicable federal guidelines, would be eviscerated. "Up-ending" the fundamental underpinnings of the cable franchising system, as urged by Verizon, is a significant matter, better suited for deliberation by Congress then adoption by the Commission under the guise of looking into better ways to effectuate cable competition under Section 621(a)(1) of the Cable Act. .

[15] Verizon Comments, Summary, page i..

2. **Verizon has refused to negotiate collectively with multiple Jurisdictions, and refused to begin video franchise negotiations despite multiple invitations to do so by ready-and-willing LFAs.** Verizon complains at length that "delay is rampant in the franchising process", and urges the Commission to establish rules requiring a specific deadline for LFA action on franchising. Verizon cites a few examples of alleged LFA delay, which it characterizes as "endemic."[16] Verizon's complaints are contrary to Verizon's actual behavior in its dealings with the MHCRC and MHCRC Jurisdictions. In connection with Verizon's announced upgrade plans in Verizon's service area in MHCRC territory (announced to MHCRC-Verizon Jurisdictions in November 2005), the MHCRC-Verizon Jurisdictions immediately made plans to negotiate, promptly and collectively, all of the necessary authorizations for Verizon's upgraded system, including any and all necessary authorizations to provide cable television services. Verizon rejected the MHCRC Jurisdictions' request for prompt, collective negotiations. Instead, Verizon indicated that it was only willing to deal with individual MHCRC Jurisdictions..

In essence, Verizon's position favors multiple, separate, more time-consuming negotiations instead of one streamlined process. Moreover, at the same time, Verizon has rejected out of hand the MHCRC Jurisdictions' request to begin cable franchising negotiations, even though Verizon concedes that cable services will eventually be offered on its upgraded network[17].

[16] Verizon Comments, II A, pp 30-33.
[17] Verizon's refusals to enter into collective negotiations with MHCRC Jurisdictions, and refusal to begin cable franchise negotiations, are documented in the official minutes of the January 23, 2006

The logical conclusion is that Verizon is intentionally misleading the Commission when complaining about "endemic" delays attributable to local governments in franchising processes. In the MHCRC's case, when Verizon was invited to actually proceed on a consolidated basis to achieve essentially 6 simultaneous franchises, Verizon hastily and emphatically withdrew. Thus, Verizon's statements are wholly inconsistent with Verizon's actions here, where any delays and inefficiencies in the local franchising process are the result of Verizon's behavior, not the processes and procedures of the MHCRC and its Jurisdictions..

3. **Verizon's objections to reasonable build-out requirements create the likelihood of discrimination and digital "redlining".** Verizon's objections to build-out requirements are in a number of respects similar to those of Qwest, and would have the same discriminatory result if validated by the Commission. The MHCRC would note, however, the irony that Verizon interprets the plain language of the Cable Act forbidding discrimination[18] as establishing the *opposite* proposition: allowing discrimination, including allowing a competitor to define its own service area regardless of redlining or discriminatory effects. Essentially, Verizon has turned the relevant statutory language "on its head" and established a proposition antithetical to the plain meaning of the statutory provisions. This is one of a number of examples of what might be called the "Alice in Wonderland" school of

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MHCRC meeting, available on the MHCRC's website at http://www.mhcrc.org/docs/Minutes/1%2023%2006minDRAFT.pdf (visited March 24, 2006).

[18] See footnote 6.

statutory interpretation, where Verizon assumes the role of the Red Queen and asserts that language means "just what I say it means, no more, no less."

4. **Verizon's interpretation of the Cable Act's franchise fee provisions implies that, when providing cable services, Verizon believes itself free of all other local taxation.** Verizon's crabbed discussion of the Cable Act's franchise fee provisions[19] implies that company appears to believe no other local taxes could be applied, despite the Cable Act's specific exception with regard to taxes of general applicability. Moreover, Verizon's narrow interpretation of the Cable Act's franchise fee provisions, coupled with its overbroad interpretation of FCC authority in this area calls into question the company's fundamental understanding of the structure of the Cable Act and the essential system of federal-local jurisdiction in cable matters that has operated for many years.

5. **Verizon's view of PEG and I-net statutory requirements and related franchise provisions is inconsistent with the statute, and directly threatens longstanding PEG and I-net requirements.** Verizon's extreme views of statutory provisions governing franchise PEG[20] and I-net requirements[21] are particularly troubling. Through interpretive gymnastics which ignore decades of settled understandings by LFAs, the cable industry, the Commission, Congress, and the Courts, Verizon in essence seeks to turn upside-down statutory provisions allowing LFAs to provide meaningful public benefits in connection with PEG or I-net-related provisions of local franchise agreements. PEG and I-net-related provisions in

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[19] Verizon Comments, Section C, pp 54-57
[20] Verizon comments on PEG, pp 64-71
[21] Verizon I-net comments, pp 72-75.

MHCRC territories form the basis of significant public services presently provided in MHCRC franchise areas. If Verizon's interpretations are taken seriously by the Commission, then substantial public services and benefits utilized by schools, public safety agencies, and local governments would be in jeopardy.

The extreme breadth of Verizon's views, which contravene and seek to invalidate key aspects of more then 20 years of cable franchising policy and practice, are perhaps best thrown into relief by the subheadings of Verizon's filed comments in this proceeding, examples of which include:

> "*Many Common Peg Demands Are Contrary to Federal Law and Invalid*" (Verizon Comments, Section II. D) and
>
> "*Most Demands for Institutional Network Facilities or Support are Invalid*" (Verizon Comments, Section II. E).

One can only ask, how could LFAs, the Courts, the cable industry, the Commission and Congress have been so wrong all these years?

Conclusion

The MHCRC and its Jurisdictions will continue to do everything reasonably possible to ensure that competitive franchises are promptly negotiated. Such franchises can and should include terms and conditions that are reasonable and equitable for all concerned, including the MHCRC and its Jurisdictions, the public and cable subscribers, the incumbent cable and telephone companies, and any and all competitors who seek to bring the benefits of competition to our community.

The initial comments of the two ILECs who serve MHCRC territory, Qwest and Verizon, misstate many aspects of cable franchising and the governing statutes. Qwest and Verizon have failed to provide proper context for the public benefit provisions administered by the MHCRC, and instead painted a truly unfair and unrepresentative picture of how cable franchises, and competitive cable franchise processes, are administered here.

We look forward to the development of facilities-based competition in MHCRC Jurisdiction areas in the provision of cable services, as well as non-cable services. We will do everything in our power to expedite this process. As the record indicates, the MHCRC has already shown its ability to handle such applications promptly and fairly.

The Mt. Hood Cable Regulatory Commission and its participating Jurisdictions are of the opinion that the record in this docket is inadequate to justify any level of preemption or interference with local government authority over franchising, or otherwise substantiate anyaction by the Commission to impair the operation of local franchising processes as guided by existing Federal law with regard to either existing cable service providers or new entrants.

Respectfully submitted,

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